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UNITED STATES OF AMERICA  
RAILROAD RETIREMENT BOARD  
844 RUSH STREET  
CHICAGO, ILLINOIS 60611

DEPT. OF LAW

Mr. Walter E. Zullig, Jr.  
General Counsel and Secretary  
Metro-North Commuter Railroad  
347 Madison Avenue  
New York, New York 10017

SEP 21 1988

L-88-104

In reply refer to  
C. 1718-88

Dear Mr. Zullig:

This is in response to your letter of August 15, 1988, concerning the treatment to be accorded under the Railroad Retirement Tax Act (RRTA) and Railroad Retirement Act (RRA) to back pay awards ordered by adjustment boards. I understand that you already have a copy of Legal Opinion L-88-8, to which you alluded in your letter.

As I noted in that opinion, section 225 of Public Law 98-76 (95 Stat. 424) amended the definition of "compensation" in the RRTA. Under the RRTA, with respect to years after 1984 compensation means any form of money remuneration paid to an individual to the extent that it does not exceed the applicable contribution base provided for in section 3231(e)(2) of that Act. The rates set forth under sections 3201 and 3221 are then applied to the compensation paid by an employer and received by an employee in a given calendar year.

In amending section 3231(e), Public Law 98-76 deleted language formerly found in section 3231(e)(2). This section read, in part, prior to amendment as follows:

"A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. An employee receiving retroactive wage payments shall be deemed to be paid compensation in the period during which such compensation is earned only upon a written request by such employee, made within six months following the payment, and a showing that such compensation was earned during a period other than the period in which it was paid. An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer,

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including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. \* \* \* (The introductory language relating to the presumption of a payment through an employer's payroll and the words "receiving retroactive wage payments" was added in 1981 by Public Law 97-34, § 743(b) and (c) (95 Stat. 348-349).)

As you can see, the language concerning pay for time lost in section 3231(e)(2) paralleled the language concerning pay for time lost that still may be found in section 1(h) of the RRA. Based upon the above-quoted language it was the interpretation of this agency, and more importantly that of the Internal Revenue Service, that where pay for time lost was involved the tax rates applicable to the payment were the rates in effect during the period to which the payments are related, that is, the time which was lost. Although only the Internal Revenue Service can give you a definitive answer to your question, it would appear that the amendments made to the RRTA by Public law 98-76 would require that pay for time lost now be considered together with other compensation paid during a given year and taxed at the rates applicable when it was paid.

A back pay award by an adjustment board may constitute pay for time lost under the criteria set forth in L-88-8, which indicates that whether such a payment is pay for time lost must be gathered from the apparent intent of the award. See also section 211.11 of the Board's regulations, which provides that an employer may report back pay in the month paid, subject to the employee's right to have it credited when earned. In this regard, I do not include in the definition of back pay retroactive wage increases which result from collective bargaining. The agency has not regarded such back pay as pay for time lost. However, such payments may be credited when earned pursuant to section 211.11.

The amount creditable as pay for time lost is the difference between what the employee actually received and what he should have received in accordance with the award of the adjustment board, subject to the monthly limit on creditable compensation. (For years after 1984, it is an annual limit.) No pay for time lost may be allocable to any month in which the adjustment board found there was no time lost, or to a month in which there was no employment relation. Thus, there can be no pay for time lost for any month after the employee has resigned or after he or she began to receive a railroad retirement annuity. However, if the

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reason for the lack of employment relation was itself the basis for the back pay award, that is, a wrongful discharge, then back pay may be allocated to the months covered by the award if the adjustment board awarded reinstatement as if the discharge had never taken place, that is, if it was the intent of the adjustment board to make the employee whole.

As you can see, there may be instances in which the amount creditable as pay for time lost under the RRA exceeds the amount of pay subject to taxation under the RRTA. The amendments to the RRTA by 98-76 radically changed the method of taxation under that statute (compensation was no longer taxed at the rates when earned subject to monthly limits, but rather when paid subject to annual limits), and clearly all the consequences of that change were not foreseen at that time. However, the anomaly described above appears to be unavoidable without amendment to the RRTA or RRA with respect to pay for time lost.

I trust that the above information will be of assistance to you.

Very truly yours,



Steven A. Bartholow  
Deputy General Counsel

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